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## Article

# The Political Economy of Judging

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When John G. Roberts took the oath of office in September 2005 as the seventeenth Chief Justice of the United States Supreme Court, the unemployment rate stood at 5.0%.<sup>1</sup> Over three years later, the Bureau of Labor Statistics estimates the unemployment rate is 8.5%;<sup>2</sup> in terms of raw data, the number of individuals seeking employment has increased from roughly 7.5 to 12.5 million in forty-one months.<sup>3</sup> Various other business cycle facts also indicate the nation is in the midst of an econom-

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1. See U.S. Dep't of Labor, Bureau of Labor Statistics, Unemployment Statistics for Previous Years (Recent Months), [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series\\_id=LNS14000000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?series_id=LNS14000000) (last visited Apr. 8, 2009).

2. See U.S. Dep't of Labor, Bureau of Labor Statistics, Employment Situation Summary, <http://www.bls.gov/news.release/empsit.nr0.htm> (last visited Apr. 8, 2009) (providing the unemployment data from March 2009).

3. See Federal Reserve Bank of St. Louis, Unemployed, <http://research.stlouisfed.org/fred2/data/UNEMPLOY.txt> (last visited Apr. 8, 2009) (listing unemployment numbers from 1948 to the present).

ic downturn: consumer prices rose roughly 6.7% over the last forty-one months;<sup>4</sup> the capacity utilization rate for total industry fell from 78.9 to 70.2%;<sup>5</sup> and the budget deficit increased from 2.6 to 2.9% of the GDP.<sup>6</sup> Indeed, even qualitative measures have been signaling national economic problems. Consumer confidence, as measured by the Michigan Consumer Sentiment Index, fell by more than twenty-six points between 2005 and 2008.<sup>7</sup> It is no surprise, therefore, that macroeconomists have officially declared the nation to be in a recession—nearly every available measure suggests the economy has moved from a state of prosperity to one of contraction and decline.<sup>8</sup>

In light of these data, it is no surprise that economic issues replaced foreign policy as the main concern of voters in the 2008 election.<sup>9</sup> It is equally unsurprising that elected politicians have sought to address the growing “economic crisis”<sup>10</sup> in an effort to stabilize markets.<sup>11</sup> The executive branch, for example, has taken a series of extreme measures, such as the rescue of Bear Stearns and the takeover of Fannie Mae, Freddie

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4. See U.S. Dep’t of Labor, Bureau of Labor Statistics, Consumer Price Index: All Urban Consumers, <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.ai.txt> (last visited Apr. 8, 2009) [hereinafter Consumer Price Index] (listing Consumer Price Index data since 1913).

5. Federal Reserve Bank of St. Louis, Capacity Utilization: Total Industry, <http://research.stlouisfed.org/fred2/series/TCU> (last visited Apr. 8, 2009) (listing capacity utilization percentages since 1967).

6. For a graph charting the federal budget deficit as a percentage of GDP, see Brookings Institution, Federal Budget Deficit as a Percentage of GDP, 1962–2082, [http://www.brookings.edu/~media/Files/events/2008/0331\\_fiscalfuture/0331\\_fiscalfuture\\_deficit.pdf](http://www.brookings.edu/~media/Files/events/2008/0331_fiscalfuture/0331_fiscalfuture_deficit.pdf) (last visited Apr. 8, 2009).

7. UNIV. OF MICH., CONSUMER SENTIMENT INDEX (2008), <http://www.sca.isr.umich.edu> (to access this database, first log in; then select “Tables” and then “Historical;” then choose “2008 Annual Table 1” on the pull down menu to access the most relevant information) [hereinafter CONSUMER SENTIMENT INDEX].

8. See *supra* notes 1–7 and accompanying text.

9. See Beth Braverman, *Voters Favor Obama’s Economic Policy-Poll*, CNNMoney.com, June 12, 2008, [http://money.cnn.com/2008/06/12/news/economy/president\\_poll/index.htm](http://money.cnn.com/2008/06/12/news/economy/president_poll/index.htm) (suggesting that voters and the press are focused on the economy and only a major international event could shift focus back to foreign policy).

10. George Stephanopoulos, *Greenspan to Stephanopoulos: This Is ‘By Far’ the Worst Economic Crisis He’s Seen in His Career*, ABCNEWS, Sept. 14, 2008, <http://blogs.abcnews.com/politicalradar/2008/09/greenspan-to-st.html>.

11. See Robert Gavin, *It May Take Trillions to Right Economy: Obama Calls for New Approach*, BOSTON GLOBE, Jan. 22, 2009, at B7.

Mac, and the American International Group.<sup>12</sup> Members of Congress have also sought to ease the crisis with legislation that would infuse private markets with capital and at the same time increase federal agency power and discretion to assist individuals harmed by the current economic conditions.<sup>13</sup>

In this Article, we investigate whether macroeconomic factors also affect decision makers in the unelected branch of government: the Justices on the U.S. Supreme Court. At first cut, one might inquire why we should expect any such effects; after all, the Justices have no authority whatsoever to adopt fiscal or monetary policy intended to relieve the economic pressures facing the nation—this power lies solely in the hands of the President and the members of Congress.<sup>14</sup> The Court, however, routinely decides cases and controversies that implicate the national economy<sup>15</sup> and for this reason the Justices may be able to play a role, albeit minor, in the nation's recovery. In fact, a significant portion of the Court's docket is comprised of legal disputes that are directly and indirectly associated with the financial well-being of the federal government, business entities, and private individuals.<sup>16</sup> Moreover, litigants are not shy about bringing the state of the economy to the Court's attention: their briefs are replete with references to macroeconomic issues such as "economic crisis,"<sup>17</sup> "banking crisis,"<sup>18</sup> "housing crisis,"<sup>19</sup> "high inflation,"<sup>20</sup> "serious unemployment,"<sup>21</sup> and so forth. The

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12. See James Rosen, *Fiscal Hawks Say Bailouts Are Killing Free Market: Lawmakers Have Little Chance to Stop Government Expansion in Form of Company Rescues*, HOUS. CHRONICLE, Sept. 21, 2008, at A5.

13. See David Cho & Michael A. Fletcher, *Stimulus Pitch Absorbs Agenda: White House Delays Bailout Details*, WASH. POST, Feb. 9, 2009, at A1.

14. U.S. CONST. arts. I–III; see also LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 196–99 (4th ed. 1997) (noting Congress's appropriation powers and the Executive's responsibility to formulate budget estimates).

15. See FISHER, *supra* note 14, at 197 (noting cases of judicial supervision over appropriations).

16. See LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 87–92 (4th ed. 1997).

17. See, e.g., Brief of Appellant at 32, *E. N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945) (No. 62).

18. See, e.g., Reply Brief for the Petitioner at 1, *Fed. Deposit Ins. Corp. v. Phila. Gear Corp.*, 476 U.S. 426 (1986) (No. 84-1972).

19. See, e.g., Petitioner's Reply Brief at 1, *Parker v. Porter*, 329 U.S. 531 (1947) (No. 80).

20. See, e.g., Brief for the Appellant at 9, *Lyng v. Int'l Union*, 485 U.S. 360 (1988) (No. 86-1471).

parties consistently refer to these issues and to national economic factors in presenting their legal arguments in the hopes of convincing the Justices that they are well-positioned to ease existing economic problems—and should use their power for this purpose.

But do the Justices pay heed? Do they respond to the business cycles that regularly occur in the economy? Existing theories of the Court lead to a range of different expectations and hypotheses. If, on the one hand, the Justices' primary goal is to give correct responses to difficult legal questions (what some call a legal model)<sup>22</sup> or if their aim is to advance their own political preferences (the political or attitudinal model),<sup>23</sup> the answer is no: the state of the economy—good, bad, or somewhere in between—will not play much of a role in their decisions.<sup>24</sup> If, on the other hand, the Justices care as much about economic growth and stability as do the nation's elected political officials (the economic model), the answer is yes.<sup>25</sup> More specifically, if the Justices seek to advance, or at least avoid interference with, the programs and policies implemented to turn the economy around, they are likely to adopt a position of *heightened* deference to the federal government in recessionary periods.<sup>26</sup> The Justices, in short, will shift away from factors that typically motivate decision making and will work as a team with the elected branches of government in the effort to advance national economic goals.<sup>27</sup>

Understanding which, if any, of these three models characterizes the relationship between Supreme Court decision making and economic conditions is worthwhile for both scholars and policymakers. First, students of the Court have long argued that legal,<sup>28</sup> political,<sup>29</sup> and institutional<sup>30</sup> factors affect judicial outcomes, but few scholars have investigated the possible effects of economic issues on judicial decision making. If the

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21. See, e.g., Brief for the Petitioners at 152, *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (No. 566).

22. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 48–50 (2002).

23. See *id.* at 92–97.

24. See *infra* Parts I.A, I.B.

25. See *infra* Part I.C.

26. See *infra* notes 32–70 and accompanying text.

27. See *infra* Part I.C.

28. SEGAL & SPAETH, *supra* note 22, at 48.

29. *Id.* at 87.

30. See *id.* at 103.

economy affects federal courts in a systematic fashion, then our understanding of the judicial system and the means by which the Justices reach their decisions is seriously incomplete. Second, because the Court decides hundreds of cases involving important economic issues,<sup>31</sup> it is possible that its decisions facilitate—or frustrate—the economic policies pursued by the other branches of government. Understanding and adjusting for this possible impact is crucial if Congress and the President hope to implement successful macroeconomic policy.

This Article hopes to develop such an understanding by exploring the possible correlation between macroeconomic conditions and economic decisions of the U.S. Supreme Court in cases in which the United States or one of its agencies is a party. Part I briefly describes how each of the three accounts—legal, political, and economic—answers the question of whether the Court responds to macro-level events. Because we limit our analysis to cases involving the United States, we also consider how each account treats the Solicitor General, the lawyer appointed to represent the U.S. government in the high Court.<sup>32</sup> As we explain below, the legal theory suggests a high level of judicial deference to the Solicitor General, but this deference is constant and unchanging irrespective of national economic conditions.<sup>33</sup> The political theory argues that the Justices defer to the Solicitor General but only when his views are aligned with those of the Court and, once again, economic cycles are irrelevant.<sup>34</sup> Finally, the economic model focuses on the business cycle and theorizes that in recessionary periods, the Court will adopt a position of heightened deference to the Solicitor in an effort to work jointly with the other branches of government to promote growth and stability, irrespective of existing legal doctrine and individual policy preferences.<sup>35</sup>

Part II explains our plan to assess these competing theories, and Part III describes the results of our empirical investigation. In brief, we find that all three models fail to characterize fully or aptly the Court's response to the macroeconomy. In contrast to the predictions of the legal approach, judicial partisan preferences affect decision making, as does the state of the

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31. EPSTEIN ET AL., *supra* note 16.

32. REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 1 (1992).

33. *See infra* Part I.A.

34. *See infra* Part I.B.

35. *See infra* Part I.C.

economy<sup>36</sup>—a finding that also works against the political model. But the economic account, at least as we have presented it here, fails too. We find that as the economy contracts, deference to the Solicitor General (and thus the federal government) *decreases*; it does *not* increase as we expected.<sup>37</sup>

In Part IV, we attempt to account for this seemingly paradoxical finding with a simple conjecture: the Justices perceive recessions as a signal of the federal government's incompetence in the context of economic policymaking and in response adopt a position of *decreased* deference to the government. The idea that the economy operates as a signal with respect to policy competence is not a new idea, of course. Numerous studies have documented voters' propensity to view declining economic conditions as a cue of incompetence which, in turn, leads to more votes in favor of an incumbent's competitor and an increased loss rate for incumbents generally.<sup>38</sup> Our findings suggest the Court acts in much the same way: the Justices use their decision power to punish elected federal officials in recessionary periods and to reward them in times of prosperity.

#### I. COMPETING ACCOUNTS OF THE COURT'S RESPONSE TO ECONOMIC UP(DOWN) TURNS

In what follows, we review several accounts of judicial decision making both generally and in the specific context of our concerns—economic decision making in cases in which the *federal government is a party*. This last aspect of the study is crucial because, as we shall see, the relative degree of deference to the United States posited by each account helps us to distinguish them for purposes of assessing their ability to characterize Court decision making in times of economic downturns and upturns.

##### A. IMPLEMENTING LEGAL DOCTRINE

One of the oldest and most well-known theories of judicial decision making assumes that Justices privilege existing legal tenets and doctrine when rendering opinions in cases and con-

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36. See *infra* Part III.

37. See *infra* Part III.

38. See Alan I. Abramowitz et al., *Economic Conditions, Causal Attributions, and Political Evaluations in the 1984 Presidential Election*, 50 J. POL. 848, 848 (1988) (listing several studies that have found that economic indicators influence congressional election results and presidential popularity ratings).

troversies.<sup>39</sup> Under this theory, the Justices are neutral deciders who look to the U.S. Constitution, legislative statutes, judicial precedent, and various other legally relevant materials in an effort to maximize correct answers to the legal issues presented.<sup>40</sup> This theory does not imply that the Justices have no personal preferences<sup>41</sup> or are always in agreement with the controlling legal precedent,<sup>42</sup> but instead holds that they are willing to set their views aside for the greater social good.<sup>43</sup> Many scholars and jurists subscribing to this theory believe, for example, that judicial obedience to and compliance with the law leads to the uniform treatment of litigants and thus a perception of fairness.<sup>44</sup> Moreover, law and doctrine is arguably valuable because it enables individuals to predict outcomes and this, in turn, permits an understanding of social and business interactions, allows reliance on expectations, creates disincentives to litigate every conflict, and ultimately deters expending private and judicial resources.<sup>45</sup> Finally, many argue that ad-

39. For background discussion on the legal model, see SEGAL & SPAETH, *supra* note 22, at 48–85.

40. *Id.* at 48–49; Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 5 & n.20 (1994) (noting that the overwhelming scholarly and judicial view on correct outcomes is that they reflect adherence to superior court rulings); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1612–13 (1995).

41. SEGAL & SPAETH, *supra* note 22, at 49–50.

42. Evan Caminker explains this as follows:

Deference need not be based on the assumption that the first court reached the correct result. Rather, the doctrines of stare decisis and hierarchical precedent are based on the realization that various institutional and substantive values are served if . . . prior interpretations (whether correct or not) are maintained into the present and future.

Caminker, *supra* note 40, at 27 n.99.

43. See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 835–40 (2003) (providing a brief discussion of the values in federal court decision making and in the standing context in particular).

44. See H. L. A. HART, *THE CONCEPT OF LAW* 126 (1988) (asserting that the strongest rationale for binding precedent is its usefulness in assuring like cases are treated alike); RICHARD A. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 69–72 (1961) (noting the link between fairness and binding precedent); see also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 652–54 (2001) (“[T]he doctrine of stare decisis is an appeal to a general principle of equality, a cousin [to] the Kantian principle of universalizability and the biblical Golden Rule.”).

45. WASSERSTROM, *supra* note 44, at 60–73 (stating that precedent is useful because it enables certainty, reliance, and efficiency that would otherwise be impossible); David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND.



herence to the law fosters respect for the judiciary because it demonstrates that the Justices draw on a body of law that represents collective experience over time rather than upon their own political and ideological viewpoints.<sup>46</sup>

Litigant briefs and oral arguments made in Court are an important aid to the Justices in their search for the best legal answers to the problems presented. Petitioners and respondents both present the facts and law in a manner that advances their own interests, and while this arguably leads to some bias, it also enables the Justices to gain an understanding of the strongest argument for each position, thereby facilitating high-quality decision making.<sup>47</sup> Generally, both parties are on equal footing in Court, but, as noted above, there is one prominent exception—the Justices historically have exhibited quite a bit of trust and confidence in the position taken by the United States as evidenced by a high level of deference in the opinions rendered. Throughout history, the federal government has prevailed in roughly 65% of all the cases it has litigated, and this win rate increases to 70% in cases involving economic issues.<sup>48</sup>

Many scholars argue this deference is both reasonable and rational. The Solicitor General represents the U.S. government in nearly all the cases in which the U.S. government is a party; he is a repeat player with substantial legal expertise on the issues at hand and has a reputation for providing unbiased information.<sup>49</sup> The Solicitor General's legal arguments, therefore, are more useful and trustworthy to the Court in its effort to build sound legal doctrine than other parties who appear infrequently and have no reputational concerns other than winning the case for the particular client at hand.<sup>50</sup> Indeed, the Justices have such a high level of faith in the Solicitor General's ability to present informed and balanced legal arguments that they sometimes invite him to present views in cases in which the

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L. REV. 495, 496 (1985) (stating that predictability in judicial decision making is a key rationale for adhering to precedent).

46. See Hathaway, *supra* note 44, at 652 (arguing that the public will view judicial decision making as fair and not capricious if it is based on precedent).

47. See WASSERSTROM, *supra* note 44, at 114–15 (stating that, through the lens of equity, a judge can make a more justifiable decision by taking account of the litigants' interests).

48. See Harold J. Spaeth, The Supreme Court Database, <http://scdb.wustl.edu/index.php> (last visited Apr. 8, 2009) [hereinafter Supreme Court Database].

49. SALOKAR, *supra* note 32, at 1–2.

50. *Id.* at 31.

United States is not even involved.<sup>51</sup> In short, the Justices appear to view themselves as a team with the other branches of federal government in their effort to build a rational system of law and doctrine.<sup>52</sup>

How does this team theory of legal adjudication account for macroeconomic trends? The answer: macroeconomic trends are completely irrelevant to the decision-making process. The Court's sole responsibility is to assure that government policies comply with the mandates of relevant federal laws, and absent a legal breach, the Court will uphold the government activity as entirely legitimate.<sup>53</sup> The legal model, in its most extreme form, gives no consideration to the individual views of the Justices themselves or to national political, economic, or cultural trends unless they are embedded into the law by way of the majoritarian process.<sup>54</sup> To do otherwise would be to undermine the very purpose of the legal approach: Justices would be forced to study the economy before reaching decisions rather than merely applying the relevant law; similarly situated litigants would be denied uniform treatment in the courtroom; and perceptions of fairness would be undermined.<sup>55</sup> In short, if economic cycles could alter judicial interpretation of the laws, litigants would be governed by the economy and not law at all.

Similarly, because the legal theory of the Court assumes the Justices rely on the Solicitor General for his legal expertise, there is no reason to expect economic factors will be correlated to an increase or decrease in judicial deference to the positions taken by the U.S. government. Or put differently, knowledge of law and doctrine is not likely to be correlated with a growing (or shrinking) economy and thus there is no rationale for the Court to alter its view of the Solicitor General in the decision-making process. He is equally valuable in economic peaks and troughs.

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51. See *id.* at 134–50 (discussing the government's role as a friend of the court).

52. See *infra* Part I.C.

53. See SEGAL & SPAETH, *supra* note 22, at 48 (stating that the basic legal model holds that precedents, statutes, the Constitution, and original intent guide decisions).

54. See *id.* at 48–49.

55. Cf. WASSERSTROM, *supra* note 44, at 60–74 (discussing the benefits of subscribing to precedent in terms of certainty, reliance, equality, and efficiency).

## B. ADVANCING POLITICAL PREFERENCES

The constrained (and some would argue naive) legal theory discussed immediately above competes with the political or attitudinal theory of judicial decision making, which assumes that Justices have political preferences and seek to embed these preferences into the opinions they render.<sup>56</sup> This theory does not ignore precedent or law-related factors, but views the development of doctrine as a means for implementing political and ideological viewpoints and for keeping lower court judges in line.<sup>57</sup> Unlike the legal theory, however, the political theory of adjudication does not assume that legal doctrine reflects inevitable, neutral, or fair outcomes after full consideration of the legal issues brought into court; doctrine is merely a mechanism to realize judicial politics.<sup>58</sup> The assumption that the Justices pursue their own goals and aims does not necessarily lead to the conclusion that individual Justices have little regard for others and no respect for the rule of law;<sup>59</sup> the point of the political theory is that the Justices do not become objective decision makers who check their personal opinions on legal controversies at the courtroom door.<sup>60</sup> Instead, the Justices have personal viewpoints *and* give them weight when issuing decisions.<sup>61</sup>

56. See SEGAL & SPAETH, *supra* note 22, at 86; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636–37 (1995) (McNollgast is the collective name used by Matthew McCubbins, Roger Noll, and Barry Weingast when writing together) (stating the assumption that judges do not check their politics at the courtroom door but rather act to bring policy as close as possible to their own preferred outcome).

57. See Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 79–80 (1994) (asserting that the Supreme Court uses legal doctrine as a signal to lower courts about the range of opinions and outcomes that it will tolerate); Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Historical Perspective*, 37 LAW & SOC'Y REV. 143, 145–50 (2003) (discussing the operation of preference and legal rules in appellate review); McNollgast, *supra* note 56, at 1641–56 (discussing precedent as a reflection of political preferences).

58. See SEGAL & SPAETH, *supra* note 22, at 92.

59. See McNollgast, *supra* note 56, at 1636.

60. RICHARD A. POSNER, *OVERCOMING LAW* 121 (1995) (arguing that judges seek to “impose their political vision on society” through opinions and rulings, just as an artist imposes an aesthetic vision on society through art); Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1472 (2001).

61. See Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818–23 (1994) (discussing situations in which judges adhered to their own idiosyncratic political or legal views despite clear Supreme Court precedent to the contrary and noting scholars' diverse

The political theory of judicial decision making does not anticipate the same role for litigant briefs and arguments as seen in the context of the legal theory; briefs and presentations are only useful if they advance the ideological viewpoints of the Court. Similarly, the Solicitor General does not have a privileged status in a politically oriented courtroom.<sup>62</sup> The Justices, of course, may award special deference to the Solicitor General, but only in circumstances in which his position is closely aligned with the preferences of the Court and not because of his ability to assist in the development of sound legal doctrine. Absent this alignment, the United States will get little or no preferential treatment and will be treated as any other litigant in the Court. Scholars (and jurists) subscribing to or acknowledging the role of judicial politics in the decision-making process forecast that the Justices will systematically vote for one party over another.<sup>63</sup> In economic cases, for example, the government is widely viewed to represent liberal views and thus liberal Justices will show an increased propensity to cast votes in favor of the Solicitor General while conservative Justices are likely to do just the opposite. In criminal cases, by contrast, conservatives are expected to favor the arguments presented by the Solicitor General, while the liberal Justices are expected to favor the individual accused of violating the law.<sup>64</sup>

Like the legal model of the Court, the political model leaves no room for macroeconomic factors to affect judicial outcomes. The Justices, of course, may have strong partisan positions on macroeconomic policymaking; various scholars, for example, have theorized that members of left-wing parties are more concerned with unemployment and growth and relatively less concerned with inflation, while members of right-wing parties have just the opposite preferences.<sup>65</sup> But these preferences show up

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reactions); cf. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 25–33 (1994) (arguing that if a court believes the Constitution and precedent are in conflict, it should ignore the precedent).

62. See generally SALOKAR, *supra* note 32, at 174–80 (discussing the office of Solicitor General as a mediator between the executive and judicial branches).

63. See SEGAL & SPAETH, *supra* note 22, at 86 (“This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices.”).

64. See Nancy Staudt, Lee Epstein, & Peter Wiedenbeck, *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1803–04 (2006).

65. See ALBERT ALESINA ET AL., POLITICAL CYCLES AND THE MACRO-ECONOMY 47 (1997).

in the judicial decision-making process by way of systematic choices in favor of the government or private individuals and do not change with economic contractions and expansions. Indeed, judicial theorists subscribing to the political theory assume that ideological preferences are stable throughout the Justices' careers<sup>66</sup> and thus cannot shift with the business cycle. Although this stability assumption is not explicit in the extant literature, it can be found in nearly all the existing measures of judicial preference and ideology as well in the empirical tests of the judicial decision making. Recently, teams of scholars have begun to question the widespread assumption of preference stability but no scholar has yet offered a theory to explain why or when the Justices will alter their political viewpoints.<sup>67</sup>

### C. PROMOTING ECONOMIC GROWTH AND STABILITY

As we suggest above, various approaches to decision making stress political or legal motivations, or some combination thereof. But it is possible these goals are privileged primarily in periods of economic stability and growth. When the economy sours and the nation is threatened with widespread economic harm, there is reason to expect a shift in judicial behavior. Specifically, given the large number of economic cases on the docket and the Court's role in contributing to national policy through its review of government programs,<sup>68</sup> it is possible that the Justices will set aside their customary objectives in order to work as a team with the other branches of federal government in a combined effort to avoid prolonged and severe periods of economic setbacks.<sup>69</sup> Theorizing that the Justices are likely to increase their level of cooperation with the elected branches of

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66. See, e.g., Lawrence Baum, *Comparing the Policy Positions of Supreme Court Justices from Different Periods*, 42 W. POL. Q. 509, 513 (1989).

67. See Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801, 806–08 (1998); Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1502–15 (2007) [hereinafter Epstein et al., *Ideological Drift*].

68. EPSTEIN ET AL., *supra* note 16.

69. Scholars such as Lewis Kornhauser and Steve Shavell have used team models to explain or investigate the hierarchical structure of the courts. See Lewis Kornhauser, *Adjudication by a Resource Constrained Team*, 68 S. CAL. L. REV. 1605 (1995); Steve Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995). No scholar, however, investigated the possibility that the team theory of decision making may explain alignment of preferences between the separate but coequal branches of federal government.

government in periods of national economic uncertainty does not lead to the conclusion that the Justices suddenly become altruistic or completely lose their well-defined beliefs and attitudes—they do not.<sup>70</sup> Rather, this theory of cooperation, sparked by economic downturns, implies that the advantages associated with putting the economy back on track begin to exceed those associated with the legal, political, and institutional interests pursued in better economic times.

The notion that the Justices' utility is linked to their level of teamwork with Congress and the President is consistent with much of the existing literature on the Court. A number of political and economic theorists have adopted the team model to investigate and explain various features of the federal judiciary,<sup>71</sup> and as noted above, the legal theory of judicial decision making itself is grounded in the idea that the Justices care very much about the development of the law and eagerly work with the other branches of the government, via deference to the Solicitor General, to create sound legal doctrine.<sup>72</sup> Accordingly, a revised model of the Court that theorizes that the Justices' objectives include the promotion of economic growth and stability through greater cooperation with federal policymakers simply expands team theory into a new, heretofore unexplored venue.

Moreover, just as the idea that the Court will at times engage in a team effort to advance broad social goals is not new, the idea that exposure or vulnerability to harm or loss increases individuals' desire to cooperate is not novel. This dynamic—perceived vulnerability leading to increased levels of cooperation—has been observed in many contexts in both the private and public spheres.<sup>73</sup> Various scholars explain the phenomenon by noting the widespread belief that individual utility is directly linked to group effort in times of perceived threat;<sup>74</sup> others

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70. See Dean Tjosvold, *Cooperation Theory, Constructive Controversy, and Effectiveness: Learning From Crisis*, in *TEAM EFFECTIVENESS AND DECISION MAKING IN ORGANIZATIONS* 79, 88–89 (Richard A. Guzzo & Eduardo Salas eds., 1995).

71. See Kornhauser, *supra* note 69, at 1605–07.

72. See SALOKAR, *supra* note 32, at 151–52.

73. See LAWRENCE BARTON, *CRISIS IN ORGANIZATION: MANAGING AND COMMUNICATING* 2–4 (1993) (discussing crisis-management as a discipline and exploring the effects of crisis on different entities); ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* 17–18 (1987); Tjosvold, *supra* note 70, at 88–90.

74. See generally BARTON, *supra* note 73, at 32–37 (discussing the importance of developing a crisis management plan in creating a cooperative approach to crisis); Tjosvold, *supra* note 70, at 86–92.

argue that cooperation can be explained by the improved guidance and direction that tend to emerge from group leaders in times of stress.<sup>75</sup> But few scholars who study cooperation and teamwork question its existence and its increased level in times of crisis. Indeed, when it comes to federal lawmaking, a number of economic historians have noted the readiness of policymakers to set aside partisan and ideological conflict in order to unite the government and to better address national emergencies.<sup>76</sup>

The reality of increased cooperation within federal policy circles in times of perceived danger is not always viewed as a normative good. Professor Robert Higgs, for example, is highly critical of this observed teamwork, taking the position that it has led to an inexorable expansion of the federal government that is impossible to reverse.<sup>77</sup> Others question whether cooperation in the federal-policy context in times of national instability or crisis is problematic because it undermines the debate and conflict that is essential to a working and successful democracy.<sup>78</sup> In this Article we do not question the normative value of federal policymakers' teamwork, but note as a descriptive matter that this teamwork emerges in periods of perceived national threat and that the expectation of cooperation is likely to exist among all federal law and policymakers, including the Justices, for the reasons described above.

Cooperation and teamwork do not mean the Court will work alongside Congress and the President to identify creative solutions to the macroeconomic policy problems facing the nation. Rather, it is far more likely that cooperation, if it exists, will emerge in the form of increased deference to the U.S. government in the cases in which it is a party. Recall that the Justices are legal and constitutional experts and are unlikely to have any economic expertise, or very little of it.<sup>79</sup> With limited

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75. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1670–74 (2003); Lynn A. Stout, *Judges and Altruistic Heirarchs*, 43 WM. & MARY L. REV. 1605, 1624–25 (2002).

76. HIGGS, *supra* note 73, at 17–18, 67–74; HAROLD C. RELYEA, CONG. RESEARCH SERV., NATIONAL EMERGENCY POWERS 1–4 (2007), available at <http://www.fpc.state.gov/documents/organization/6216.pdf>.

77. HIGGS, *supra* note 73, at 67–74.

78. See Glenn E. Fuller, Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CAL. L. REV. 1453, 1453–57 (1979).

79. See generally EPSTEIN ET AL., *supra* note 16, at 263–398 (providing data on Justices' backgrounds).

information and know-how, the Court will not seek to participate in the creation of new macroeconomic policy but will defer to the elected branches of government that have the ability, experience, and knowledge to address economic issues.<sup>80</sup> If the Justices increase their level of cooperation, then we should expect the U.S. government to prevail in many more of the cases it litigates during recessionary periods. In short, the arguments made by the Solicitor General will become more trustworthy and reliable given that he represents the views of federal policymakers, experts in the nation's finances.

The notion that the Justices pursue economic stability and growth through increased deference to the federal government in recessionary periods offers a theoretical account for Court scholars who have questioned the long-standing assumption that Justices display preference stability throughout their careers.<sup>81</sup> If the Justices indeed do modify their decision making to take account of national economic cycles, then we would expect ideological drift: both liberal and conservative Justices will show an increased propensity to favor the federal government when the economy turns sour. Because decisions that work in favor of the government are perceived as liberal if rendered in the economic context, the theory would suggest that, conditional on an economic downturn, the Court will systematically exhibit greater liberalness, but upon economic recovery, the Justices will revert to their prior—more conservative—preferences.

## II. ASSESSING THE ACCOUNTS

In this Part, we empirically interrogate the various accounts presented above, with particular focus on the economic model. Part II.A describes the data collection process; Part II.B explains our statistical models and our predictions; and Part II.C presents the findings. As we previewed, the results indicate that the Court responds to changes in the economy—but not in the way any of the accounts suggest. In periods of declining economic conditions, the Court is less likely to defer to the federal government than in times of prosperity.

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80. Cf. FARROKH K. LANGDANA, *MACROECONOMIC POLICY* (2002) (providing an overview of the macroeconomic issues that must be taken into account in forming a coherent economic policy).

81. See Epstein et al., *Ideological Drift*, *supra* note 67, at 1484–87.



## A. DATA COLLECTION

We collected the data in three steps. First, for purposes of gathering information on Supreme Court decisions, we relied on Harold J. Spaeth's U.S. Supreme Court Database (covering the 1953–2007 terms).<sup>82</sup> Given our focus, we retained only those cases: (1) in which the U.S. government or a federal agency was a party; and (2) that involved economic regulation—including taxation, securities, and antitrust.<sup>83</sup> As a result of this culling process, the dataset includes 827 cases; the government prevailed (coded 1) in 580 (70%) of these cases.<sup>84</sup> The question, of course, is whether this win rate is constant over time (as the legal model would predict),<sup>85</sup> or whether it is correlated at statistically significant levels with either national economic contractions and expansions (consistent with the economic model) or the political values of the Justices (as the political model predicts).<sup>86</sup>

The second step of our data collection process consisted of amassing information on the state of the macroeconomy. What we hope to tap into is the business cycle: the repeated sequence of economic expansion, giving way to a decline, and then followed by recovery.<sup>87</sup> From the relevant literature, we know that various macroeconomic variables are associated with this cycle, including industrial production, consumption, investment, employment, inflation, and stock prices.<sup>88</sup> Nearly all of these factors, often called business cycle facts, are procyclical in the sense that they move in the same direction as the aggregate economic activity, although unemployment is countercyclical and real interest rates are acyclical.<sup>89</sup> In addition to timing, some of the variables, such as investment activity, tend to lead aggregate business activity (it moves in advance of the business cycle), while others are coincident, such as consumption and employment; others such as inflation are lagging; still others, such as unemployment, are unclassified with respect to tim-

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82. Supreme Court Database, *supra* note 48.

83. These are represented by values 7, 8, and 12 in the Spaeth Supreme Court Database. *See id.*

84. *See id.*

85. *See supra* Part I.A.

86. *See supra* Parts I.B, I.C.

87. ANDREW B. ABEL & BEN S. BERNANKE, MACROECONOMICS 289 (2d ed. 1995).

88. *Id.* at 300–14.

89. *Id.* at 312.

ing.<sup>90</sup> For purposes of this investigation, we focus on the economic peaks and troughs as identified by the National Bureau of Economic Research (NBER) Dating Committee,<sup>91</sup> the percentage change in inflation from month to month,<sup>92</sup> the percentage change in employment from month to month,<sup>93</sup> and the percentage change in real quarterly Gross Domestic Product (GDP).<sup>94</sup> We also included two variables that tap into the general “mood” of the public with respect to the economy. The first is a measure of consumer confidence and the second measures consumer expectations with respect to prices as reported by the Reuters/University of Michigan Survey of Consumers.<sup>95</sup> A simple correlation table suggests that the official statistics are highly correlated with the mood measures and in the expected direction.<sup>96</sup>

We also gathered data on the partisan preferences of the Court, specifically, the proportion of the Justices appointed by Republican Presidents. Theoretically this variable could range from 0 to 1, but in fact the proportion of Republican-appointed Justices in the dataset ranges from 0.22 to 0.89. Our idea, in line with various political accounts of decision making, is that (at least for our time frame) a Court dominated by Republican appointees is less likely to support government efforts to regulate the economy than a Court populated by Democrats.<sup>97</sup> Along a similar vein, we incorporated a variable indicating whether or

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90. *Id.* at 300–14.

91. See Nat’l Bureau of Econ. Research, Business Cycle Expansions and Contractions, <http://www.nber.org/cycles.html> (last visited Apr. 8, 2009) [hereinafter Business Cycle].

92. See Consumer Price Index, *supra* note 4.

93. See U.S. Dep’t of Labor, Bureau of Labor Statistics, Employment Hours and Earnings from the Current Employment Statistics Survey, <http://www.bls.gov/ces/home.htm> (last visited Apr. 8, 2009) [hereinafter Employment Hours and Earnings].

94. See Bureau of Economic Analysis, National Economic Accounts: Current-Dollar and “Real” GDP, <http://www.bea.gov/national/index.htm#gdp> (select link called “Current-Dollar and ‘Real’ GDP”) (last visited Apr. 8, 2009) [hereinafter “Real” GDP].

95. See CONSUMER SENTIMENT INDEX, *supra* note 7.

96. For more information about the data sets the authors created for their research, consider consulting the project’s website, which contains many of the data sets and empirical research that provide the basis for these conclusions. See Replication Archive, <http://epstein.law.northwestern.edu/research/PoliticalEconomy.html> (last visited Apr. 8, 2009). Those interested in studying these issues in greater depth should visit the website and contact the authors.

97. In our database, Democratic courts decided fifty-nine percent of the cases (n=488) and Republican courts decided forty-one percent (n=339).

not the United States was the Petitioner or the Respondent in the Supreme Court.<sup>98</sup> This accounts for the Court's propensity to reverse decisions of the lower courts, which, in turn, may reflect strategic-political considerations on the part of the Justices.<sup>99</sup> Finally, we included a dummy variable for each decade in the dataset in order to pick up possible trends in the judicial decision-making process.

## B. STATISTICAL MODELS AND PREDICTIONS

For purposes of identifying the possible effects of national economic conditions on the U.S. Supreme Court, we examine the effects of the various macroeconomic variables on the probability of a win for the federal government. Because the dependent variable is binary<sup>100</sup> and because we observe a high level of collinearity between the variables of interest,<sup>101</sup> we specify six separate probit models:

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{economic\_cycle}_j} + \beta \mathbf{X}_{ij}) \quad (1)$$

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{inflation}_j} + \beta \mathbf{X}_{ij}) \quad (2)$$

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{employment}_j} + \beta \mathbf{X}_{ij}) \quad (3)$$

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{GDP}_j} + \beta \mathbf{X}_{ij}) \quad (4)$$

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{expectation\_inflation}_j} + \beta \mathbf{X}_{ij}) \quad (5)$$

$$\Pr(Y_{ij} = 1) = \Phi(\beta_0 + \beta_{\text{consumer\_confidence}_j} + \beta \mathbf{X}_{ij}) \quad (6)$$

In each model,  $y$  is the Court's outcome in case  $i$  in Term  $j$ . As noted above, all the cases in the database involve the U.S. government and are coded as 1 if the government prevails and

98. See *infra* p. 123 tbl.1. When the United States was the Petitioner, we used the variable 1, and when the United States was the Respondent, we used the variable 0.

99. See generally Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387, 393 (1982) (hypothesizing that Justices are more likely to grant certiorari when they disagree with the lower court).

100. For a discussion of models for binary dependent variables, see J. SCOTT LONG, *REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES* 34–84 (1997).

101. Collinearity between the variables leads to biased point estimates and at the same time inflates the error terms. See JACK JOHNSTON & JOHN DI-NARDO, *ECONOMETRIC METHODS* 89 (4th ed. 1997) (“With perfect or exact collinearity the standard errors go to infinity.”).

0 if the government loses in Court. In the first model, the variable  $\beta_1$  is a binary variable coded equal to 1 if the nation is in a period of prosperity and coded equal to -1 if the nation is in a recessionary period, as determined by the NBER.<sup>102</sup>  $\beta_x$  is a vector of variables, including the proportion of Republican-appointed Justices on the Court; a binary variable equal to 1 if the United States is the appellant, and 0 otherwise; and six dummy variables to pick up any possible time trends with respect to judicial decision making.

In the second model,  $\beta_1$  is the percentage change in inflation from a month ago;<sup>103</sup> in the third model  $\beta_1$  is the percentage change in employment from a month ago;<sup>104</sup> in the fourth model  $\beta_1$  is the percentage change in real quarterly GDP;<sup>105</sup> in the fifth model  $\beta_1$  is consumer expectations with respect to percentage increase/decrease in prices; in the sixth model  $\beta_1$  is the Reuters/Michigan Consumer Sentiment Index, which is measured on a continuous scale where higher values indicate a greater degree of optimism and thus higher levels of expected consumer spending.<sup>106</sup>  $\beta_x$  represents the same vector of variables described above.

If the economic approach aptly characterizes the Court's decisions then we expect economic downturns to cause an increase in government win rates. Accordingly, we expect the variables *Economic Cycle*, *Employment*, *GDP*, and *Consumer Confidence* all to have a negative coefficient (thus recessions, low employment rates, low GDP rates, and low levels of consumer optimism trend with a high level of pro-government outcomes). Similarly, we expect the variables *Inflation* and *Expected Inflation* to have positive coefficients, indicating that as inflation goes up—or as consumers expect prices to increase—the government wins more often. If either the political theory of judicial decision making<sup>107</sup> or the legal theory<sup>108</sup> is descriptively accurate, we expect all the economic variables to be equal to 0, that is, we should observe no macroeconomic effects on Supreme Court decision making.

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102. See Business Cycle, *supra* note 91. Appendix B includes a table listing the economic peaks and troughs.

103. See Consumer Price Index, *supra* note 4.

104. See Employment Hours and Earnings, *supra* note 93.

105. See "Real" GDP, *supra* note 94.

106. See CONSUMER SENTIMENT INDEX, *supra* note 7.

107. See *supra* Part I.B.

108. See *supra* Part I.A.

## C. POSSIBLE SELECTION EFFECT

Before turning to the empirical findings, it is important to comment on possible selection effects. For purposes of this essay, we conceptualize the effects of economic variables on the Court as if they were a “treatment” on the Justices. Economists label this type of study a “natural experiment” because the treatment arguably arose due to an exogenous event.<sup>109</sup> In this context, it is clear that the Justices themselves did not cause the economic expansion or contraction; indeed, many experts argue that identifying the cause of macroeconomic cycles is impossible—we know they occur but not what causes them.<sup>110</sup> A natural experiment or quasi-experiment always has a control group, which is not affected by the event, and a treatment group, which we believe is affected.<sup>111</sup> The behaviors or outcomes of the two groups are then compared for purposes of measuring the affects of the treatment on the population of interest.<sup>112</sup> Because the U.S. experienced at least nine recessionary periods from 1953–2006,<sup>113</sup> we can think of the study as a series of nine natural experiments on the Court.

The central feature of a classic randomized experiment—the existence of a control group to estimate what would have happened in the absence of the treatment—lies behind the idea of a natural experiment, which is what this study relies upon to identify the effects of economic conditions.<sup>114</sup> In the natural experiment, the researcher must make use of the differences in outcomes between the treatment group and a control group, just as in a classic experiment, but the treatment status emerges through nature rather than at the hand of the scientist.<sup>115</sup> The fact that the treatment status in our study was not determined by a randomized procedure but by nature, of course, raises the possibility that any comparison between the

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109. DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMIES OF THE MINIMUM WAGE 22–25 (1995) (describing the frequency with which economists use natural experiments).

110. For a useful discussion of what causes the business cycle and how policymakers should respond, see ABEL & BERNANKE, *supra* note 87, at 282–442.

111. CARD & KRUEGER, *supra* note 109, at 22.

112. See *id.* at 22–25 (explaining how natural experiments work and how they differ from other types).

113. See Business Cycle, *supra* note 91.

114. See CARD & KRUEGER, *supra* note 109, at 22–25 (comparing natural experiments with typical “hard science” experiments and showing that a control group is necessary for each type).

115. *Id.*

two groups of cases will be biased.<sup>116</sup> In order to determine the credibility of the natural experiment—to assure unbiased results—it is important to examine the characteristics of the cases that were placed into the control and treatment groups due to the economic downturn that emerged.<sup>117</sup> Valid causal inference requires that the treatment and control groups be identical on all relevant factors.<sup>118</sup> If the two groups differ, then it is possible that the observed differences in judicial outcomes have nothing to do with the economy and everything to do with the type of case litigated in Court or the judicial makeup of the Court.

For purposes of this study, the average changes in inflation rates, employment rates, GDP, and consumer confidence are quite a bit different in periods of economic contraction and expansion<sup>119</sup>—but this is exactly as expected. The politics of the Court and the federal government as an appellant, by contrast, exhibit similarity under various economic conditions and this offers some (albeit limited) evidence for the credibility of this natural experiment for assessing the effects of the macroeconomy on the Court.

This comparability cannot identify the unobservables associated with possible litigant strategies that shift depending on the economic conditions at hand. If either party pursues easier (or harder) cases given macroeconomic factors, then this fact could explain the empirical results obtained, not the economy itself. Moreover, if the macroeconomy affects the Justices' decisions to grant certiorari or their ultimate decision on the merits, then our empirical findings may be confounded.

For purposes of this essay, however, we assume that we have a legitimate natural experiment. In further research, we plan to investigate this important question in order to determine whether a selection problem in fact exists in the study, thereby potentially raising doubts about the conclusions reached here. Indeed, this selection problem may exist in all empirical studies of the Supreme Court, but no scholar has systematically investigated the problem. Accordingly, this is a gap

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116. See *id.* at 23 (noting the possibility of bias in natural experiments).

117. See *id.* at 23–24 (noting the importance of analyzing the characteristics of the control group).

118. See *id.* (citing the importance of having similarity between the treatment and control groups for the validity of the experiment).

119. See *infra* p. 123 tbl.1.

in the literature upon which we will focus and seek to fill not only for this particular study, but for all future court studies.<sup>120</sup>

### III. EMPIRICAL RESULTS

With this important caveat noted, we turn to the results of our modeling exercise. We find that the variables *Cycle*, *Employment*, *Expected Inflation*, *Government is Petitioner*, and *Proportion Court Republican* are all statistically significantly correlated with the government's win rate according to Table 1. Recall that we included the variable, *Government is Petitioner*, merely to control for the Court's propensity to grant certiorari to cases in order to reverse them. Our model confirms this, as expected, but the finding does not go to the validity of the legal, political, or economic model of decision making, so we set this variable aside for now.

As Table 1 indicates, and in line with political accounts<sup>121</sup> (though not with the traditional legal model),<sup>122</sup> the Court's partisan composition, as indicated by the variable *Proportion Court Republican*, exerts a significant effect on the government's success rate. Five of the six models indicate that as the proportion of Republican appointees on the Court decreases, the government is more likely to win. In substantive terms, the models suggest that as the Court becomes populated with more and more Democratic appointees, the government win rate increases anywhere from 12% to 18%; these estimates are not the confidence intervals but the point estimates of the marginal effects in the models. As noted, however, this finding holds for five of the six models; politics does not appear to exert the same impact in model 6, which corresponds to a shorter time period than the other models, since expected inflation numbers are only available from 1978 onward.

What of our chief concern—the macroeconomy? Well, as Table 1 shows, nearly every one of the economic variables is in the opposite direction than we hypothesized. Moreover, the variables *Employment* and *Expected Inflation* are both statistically significant at the 1% level in the opposite direction predicted!

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120. For a preliminary investigation, see Nancy Staudt & Tyler J. VanderWeele, *Causal Diagrams for Empirical Legal Research: Methodology for Identifying Causation, Avoiding Bias, and Interpreting Results* (2008) (unpublished manuscript, on file with the author), available at <http://epstein.law.northwestern.edu/research/JudicialBehaviorStaudt.pdf>.

121. See *supra* Part I.B.

122. See *supra* Part I.A.

The variable *Cycle* is also significant at the 11% level in the opposite direction. As the economy cycles into a recession, as employment rates decrease, and as consumers expect higher levels of inflation, the level of deference not only fails to increase, but as a statistical matter, it actually *decreases*. These findings are robust in various specifications of the models, with and without time lags.

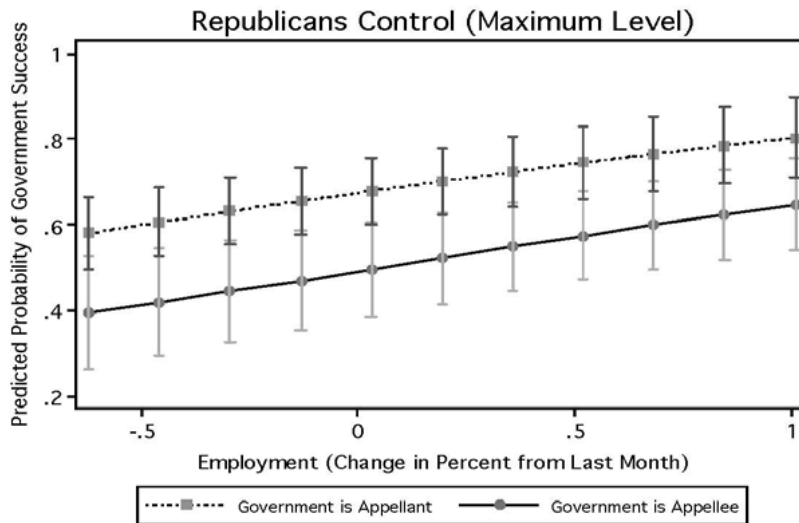
Probit Models						
Variable	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Cycle	.11 (.07)	—	—	—	—	—
Inflation	—	.03 (.19)	—	—	—	—
Employment	—	—	.41*** (.07)	—	—	—
GDP	—	—	—	.01 (.01)	—	—
Consumer Confidence	—	—	—	—	.002 (.006)	—
Expected Inflation	—	—	—	—	—	-.014*** (.001)
Government Is Petitioner	.48*** (.09)	.48*** (.09)	.48*** (.08)	.48*** (.09)	.48*** (.09)	.34*** (.04)
Proportion Court Republican	-.52* (.31)	-.50*** (.17)	-.37 (.47)	-.45** (.22)	-.45*** (.16)	.02 (.17)
Time Controls	Yes	Yes	Yes	Yes	Yes	Yes
Constant	.33* (.20)	.38*** (.09)	.28 (.23)	.36*** (.13)	.16 (.55)	.29 (.26)
N	814	814	814	814	814	299
Log-Likelihood	-477.79	-479.17	-476.26	-479.15	-479.10	-189.45

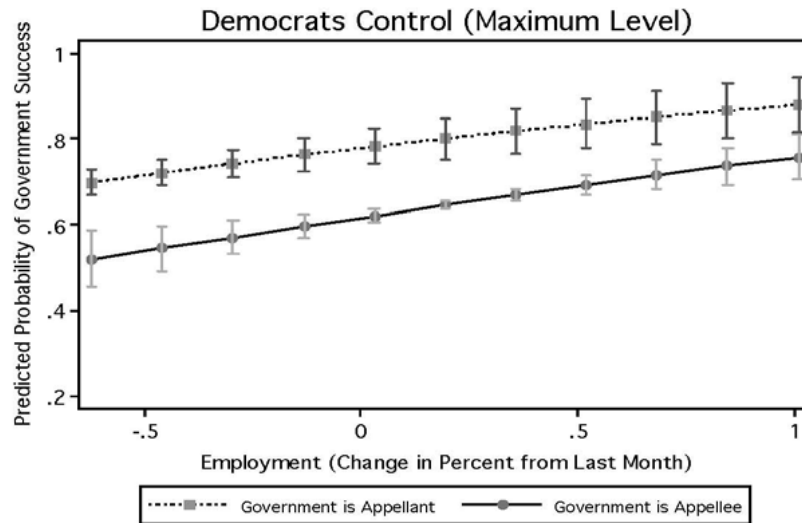
**Table 1. The Success of the Federal Government in the U.S. Supreme Court, Economic Cases (1953–2006 Terms).** Note: Cell entries are probit coefficients with clustered standard errors (by Chief Justice) in parenthesis. We generated these estimates using “dprobit” in STATA. \*\*\* indicates  $p \leq .01$ , \*\* indicates  $p \leq .05$ , and \* indicates  $p \leq .10$ . The dependent variable is whether the U.S. government or a federal agency prevailed (=1) or not (=0).

As a substantive matter, the effects on judicial outcomes are quite strong. In particular, changes in the employment rate exert a notable impact on the likelihood of a government win. We make this point in Figure 1, which shows the predicted probability of Republican and Democratic Courts voting in favor of the government (as the petitioner and respondent) over



the range of employment rate changes from month to month, with a minimum (worst) (-.66) to a maximum (best) (1.006). Note that for both types of Court—Democratic and Republican—the odds of the United States or its agencies prevailing fall precipitously as the employment rate decreases, and this finding holds whether the U.S government is a petitioner or a respondent. At the highest employment rate, our statistical model predicts that a Democrat-dominated Court will support the government in about nine out of every ten government appeals and roughly seven out of every ten cases in which the government is the appellee; when employment rates decrease, however, the ratio falls to seven out of every ten cases when the government is the appellant and to five out of every ten when the government is the appellee. Republican Courts too are far less likely to defer to the government in periods of low employment. When Republican appointees are in control and when employment rates reach their lowest, the United States has just a 40% chance of winning when it shows up as the appellee.





**Figure 1. Predicted Probability of the Court Voting for the Government as the Employment Rate Moves from Its Minimum to Maximum Values.** Note: The panels in this figure show the predicted probability of Republican and Democratic Courts ruling in favor of the government (as petitioner and respondent) over the range of the values of the percentage changes in monthly employment based on the model in Table 1. The vertical lines are 95% confidence intervals. All other variables (see Table 1) are set at their means or modes.<sup>123</sup>

#### IV. THE ECONOMY AS A SIGNAL OF GOVERNMENT (IN)COMPETENCE: A CONJECTURE

What our data suggest—but not our theory—is that perceived federal incompetence correlates to decreased levels of deference to government positions. Indeed, none of the accounts we offered can explain our results. For traditional legal approaches,<sup>124</sup> the correlation between the Court's partisan composition and case outcomes is inexplicable; for political approaches,<sup>125</sup> the correlation between the economy and the government success rate is equally curious. As for increased deference in economic downturns, the data point in precisely the opposite direction: increased skepticism.

To explain these rather odd results we offer the following conjecture: because recessionary periods may signal incompe-

123. This figure was generated via S-Post, <http://www.indiana.edu/~jslsoc/spost.htm>.

124. See *supra* Part I.A.

125. See *supra* Part I.B.

tence on the part of the President and his advisors, the Court punishes them by altering its level of deference to the government's representative, the Solicitor General (and vice versa) in periods of economic prosperity.

Recall that as a presidential appointee, vetted by the Senate, the Solicitor General represents the views of the federal government in Supreme Court litigation.<sup>126</sup> He defends these views and policies regardless of whether the nation's finances are thriving or deteriorating.<sup>127</sup> If the Justices view economic downturns as evidence of policymaking incompetence, then pro-government outcomes are likely to decrease in recessionary periods. In short, rather than cooperating with the U.S. government in addressing economic issues, the Justices will seek to dilute the policies that appear to effectuate more harm than good.

The notion that the Justices will interpret variables such as high unemployment, inflation, or decreased GDP as a signal that the federal government is incapable of managing the economy is consistent with the extant literature that has explored this signaling theory in the context of voting.<sup>128</sup> Numerous studies have shown that voters assess candidates quite differently in periods of economic upturns than downturns.<sup>129</sup> Voters, in effect, view bad economic times as a cue that the current government is unable to manage the national economy and should be replaced.<sup>130</sup> The Justices are not in a position to replace the incompetent policymakers, but they can refuse to implement their flawed programs.

Given that Republican appointees are likely to maintain their majority on the Court for the foreseeable future, our conjecture holds mixed news for the next administration. *If we are right* and if the economy remains on the down side of the business cycle, the Court may well compound the government's

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126. SALOKAR, *supra* note 32, at 106.

127. *See generally id.* at 106–33 (describing the role of the Solicitor General as representative of the government in front of the Supreme Court).

128. For a terrific collection of ten short essays noting the possible effects of economic factors on national elections, see Symposium, *Forecasting the 2008 National Election*, 41 POL. SCI. & POL. 679 (2008).

129. *See, e.g.*, Brad Lockerbie, *Election Forecasting: The Future of the Presidency and the House*, 41 POL. SCI. & POL. 713, 713 (2008) (describing how the state of the economy may influence voters' decisions).

130. *See, e.g.*, Michael S. Lewis-Beck & Charles Tren, *The Job of President and the Jobs Model Forecast: Obama for '08?*, 41 POL. SCI. & POL. 687, 687 (2008) (arguing that the decreased amount of new jobs under a Republican President will cause more people to vote for Democrats in the 2008 election).

problems—punishing it through its rulings. On the other hand, *if we are right* and if the incoming President is able to usher in a period of economic prosperity, the United States should generally find itself on the winning side of the cases it appeals.

But these are big ifs. Simply because our data are consistent with the signaling conjecture should not be taken as evidence of its truth; after all, we developed it to explain our results, as a new way of looking at the facts we collected. Confirming the signaling conjecture requires—as do all hypotheses—vulnerability. We must be able to prove ourselves wrong, which is impossible when we have developed a theory to fit the data. Accordingly, the task before us is to develop a new dataset before concluding that data confirm the conjecture.

This is not, however, the only challenge we confront. In addition to collecting fresh data, we must deal with the many limitations of the preliminary study we have presented here. To name just a few:

*Selection effects.* As we noted earlier, it is entirely possible that the kinds of cases the government litigates, and the Justices decide to hear, differ during peaks and troughs in the business cycle. For purposes of this study, we decided to put this concern to the side. Because this was likely a perilous choice, in follow-up analyses we intend to make use of methods developed in the statistical sciences to deal with the selection problem we confront here.

*The Justices' political preferences.* For this study, we captured the Court's political preferences with a measure keyed to the percentage of the Court appointed by a Republican President.<sup>131</sup> While we believe that partisanship is the most relevant factor in decision making in the economics context—at least since 1953, the parties have staked out rather different and relatively clear positions—other formulations are possible. Moreover, in light of dominant theories in political science,<sup>132</sup> it may be worthwhile to consider measures designed to tap the Justices' ideology (if only as a robustness check).

*The political context.* While legal and political models are quite prevalent in the social science literature, so is another: institutional accounts. These come in different flavors but the basic idea is straightforward enough: whether to maintain their legitimacy or to maximize their policy preferences (for example,

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131. See *supra* p. 123 tbl.1.

132. See *supra* Part I.B.

to ensure that the ultimate state of law reflects, to the extent possible, their preferred policies), the Justices attend to the preferences and likely actions of the elected branches.<sup>133</sup> We, in turn, should attend to this account in our model, incorporating variables designed to represent the preferences of the various political actors. Doing so would also enable us to detect whether Republican Courts, for example, defer to Republican governments—but not Democratic governments—during times of economic crisis.

*The macroeconomy.* Our statistical model houses six variables to tap the macroeconomy—economic cycles, employment, inflation, GDP, consumer confidence, and consumer expectations with respect to prices. These may be the most obvious, and the most indicative of peaks and troughs in the business cycle, but they are not the only ones. In future studies, we intend to assess the robustness of our findings by considering other possible indicators.

### CONCLUSION

Scholars and commentators have long argued that Supreme Court Justices seek to advance legal and political goals in the decision-making process,<sup>134</sup> but for just as long have ignored the role the macroeconomy may play in disputes involving economic regulation. We sought to fill this gap by considering the effect of variables designed to tap the state of the macroeconomy—economic cycles, inflation, employment, GDP, consumer confidence, and expectations as to consumer prices—even after controlling for the political composition of the Court. Advancing an economic theory of the Court that hypothesized heightened levels of teamwork, we expected to find that the Justices would desire to cooperate with the other branches of government in recessionary times in order to promote national economic goals. Accordingly, we suspected they would be more likely to defer to the United States in periods of economic crisis.

We were wrong. As it turns out, the government is less likely to prevail in times of recession and more likely to tri-

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133. See Jeffrey A. Segal, *Supreme Court Deference to Congress*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 240–52 (Cornell W. Clayton & Howard Gillman eds., 1999) (discussing how shifts in the political climate of Congress may have an impact on the way Justices vote on the Supreme Court).

134. See *supra* Parts I.A, I.B.

umph in times of relative prosperity. A 1% increase in employment rates leads to a 13% increase in the government's win rate, and all the other economic variables, while not statistically significant, show a similar trend.<sup>135</sup> To explain these findings we offer a signaling conjecture: the Justices will interpret economic downturns as signals that the federal policymakers are incompetently managing the economy, and thus will decrease their deference to the Solicitor General when the economy sours.

We propose to test this conjecture in future studies, but for now it is the larger point that should not be missed: without consideration of business cycles at least in the area of economic regulation, the extant literature on judicial decision making is incomplete and in need of revision.

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135. See *supra* p. 125 fig.1.

## APPENDIX

In what follows we supply more information on our measures of the macroeconomy. With respect to the figures, the graphs show how various measures cycles with the economy and chart larger macroeconomic trends.<sup>136</sup>

## A. CORRELATION TABLE

The tables below indicate that the historic values of our variables of interest are nearly all highly correlated and in the expected direction. The first table indicates correlations for the five variables with data available since 1953. The second table indicates the correlations of all six variables since 1978.<sup>137</sup>

	Cycle	Sent	Employ	GDP	Inflation
Cycle	1.00	0.47	0.57	0.55	-0.13
Sent	0.47	1.00	0.36	0.40	-0.45
Employ	0.57	0.36	1.00	0.56	-0.00
GDP	0.55	0.40	0.56	1.00	-0.13
Inflation	-0.13	-0.45	-0.00	-0.13	1.00

136. Additional data about the authors' measures of the macroeconomy is available on their website. See Replication Archive, <http://epstein.law.northwestern.edu/research/PoliticalEconomy.html> (last visited Apr. 8, 2009).

137. See Federal Reserve Bank of St. Louis, Economic Data – FRED, <http://research.stlouisfed.org/fred2> (last visited Apr. 8, 2009) [hereinafter FRED Data].

	Cycle	Sent	Employ	GDP	Inflation	Exp Infl
Cycle	1.00	0.45	0.57	0.51	-0.10	-0.23
Sent	0.45	1.00	0.38	0.37	-0.42	-0.65
Employ	0.57	0.38	1.00	0.57	0.06	-0.01
GDP	0.51	0.37	0.57	1.00	-0.03	-0.17
Inflation	-0.10	-0.42	0.06	-0.03	1.00	0.67
Exp Infl	-0.23	-0.65	-0.01	-0.17	0.67	1.00

#### B. THE BUSINESS CYCLE

We used National Bureau of Economic Research data to determine when the country was in a state of recession—the period between a trough and peak. The table below provides the dates of recessions occurring during our sample, and the following table illustrates the cycle of recessions and expansions.<sup>138</sup>

138. See Business Cycle, *supra* note 91; FRED Data, *supra* note 137.



Date	Peak/Trough	Contraction/Expansion (Months to Turning Point)
October 1949	Trough	45 (Korean War)
July 1953	Peak	10
May 1954	Trough	39
August 1957	Peak	8
April 1958	Trough	24
April 1960	Peak	10
February 1961	Trough	106 (Vietnam War)
December 1969	Peak	11
November 1970	Trough	36
November 1973	Peak	16
March 1975	Trough	58
January 1980	Peak	6
July 1980	Trough	12
July 1981	Peak	16
November 1982	Trough	92
July 1990	Peak	8
March 1991	Trough	120
March 2001	Peak	8
November 2001	Trough	73 (Afghanistan/Iraq War)

